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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEN THURM et al.,	
Plaintiffs and Respondents,	G039112
v.	(Super. Ct. No. 02CC06342)
CUSTOM POOL PLUMBING et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, John M. Watson and H. Warren Siegel, Judges. Affirmed.

Law Offices of Daniel S. Doonan, D. Scott Doonan and Lynne Rasmussen for Appellant and Defendant Custom Pool Plumbing.

Patton Boggs and Christopher W. Hellmich for Appellants and Defendants Calkins Construction and Gary L. Calkins.

Morris & Stone and Aaron P. Morris for Plaintiffs and Respondents.

* * *

Calkins Construction, Gary L. Calkins (collectively, Calkins) and Custom Pool Plumbing appeal from a judgment of dismissal in which the trial court determined defendants were bound by a settlement agreement they reached with Ken Thurm and Tina Peterson-Thurm (the Thurms) to complete patio and spa repairs. In dismissing the matter, the trial court retained jurisdiction to ensure defendants complied with the settlement agreement. (Code Civ. Proc., § 664.6; all further unlabeled statutory citations refer to this code, unless specified otherwise.) Defendants argue the trial court erred in declining to dismiss the Thurms' lawsuit for want of prosecution within five years. (§§ 583.310, 583.360.) Defendants assert the purported settlement agreement they entered with the Thurms was illegal, and therefore did not toll the five-year limitations period. Defendants had constructed a retaining wall that encroached on property belonging to the Thurms' neighbors, but the settlement agreement's provision that defendants repair the wall did not necessarily entail that they trespass on the neighbors' property. Consequently, the settlement agreement was not a contract to commit illegal acts, and was fully enforceable. We therefore affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Thurms hired defendants to install a spa and a patio area in their backyard. The scope of work included construction of a retaining wall. Contending the defendants' shoddy performance in completing the improvements caused severe soil subsidence rendering the backyard unusable, the Thurms sued defendants for negligence on October 15, 2001.

Sometime in 2002, the parties learned the retaining wall had been erected past the Thurms' property line, encroaching on their neighbors' property.

After an amendment to the complaint, other pleading issues and continuances delayed the case for three and one-half years, it finally came on for trial before Judge Watson on April 25, 2005. In open court, the parties stipulated to a settlement agreement in which Calkins agreed, among other things, to repair the retaining wall and Custom Pool Plumbing agreed to repair the spa. The Thurms agreed to cooperate with Calkins in his pursuit of another contractor he blamed for the subsidence.

The settlement agreement set June 15, 2005, as the deadline for the Calkins defendants to begin remediation. Their attorney, Christopher Hellmich, advised opposing counsel by letter that his clients began work that day but, coincidentally, the Thurms saw Calkins in the airport on June 15th. No work had yet commenced. The next week, Hellmich filed a motion to enforce the settlement agreement, requesting sanctions on grounds the Thurms failed to provide a motorcycle VIN number Hellmich believed would lead to the missing contractor. Calkins announced he would not begin his remediation efforts until the court heard his motion. Hellmich withdrew the motion in July 2005 after the Thurms explained they did not know the VIN number.

The Thurms pressed Calkins to provide plans for the wall necessary to obtain a city permit. When Hellmich finally emailed boilerplate specifications, the city rejected them as inadequate. The Thurms filed a motion to enforce the settlement agreement in September 2005. At the hearing in October 2005, apparently dismayed over the parties' squabbling, Judge Watson denied the motion and set a trial date instead, exclaiming that "whoever is wrong is going to wish they weren't. They're going to wish their settlement had gone through until they lay their heads gently in the sod." The trial court set a trial date for January 30, 2006.

When that day came, however, the trial court relented, vacated trial, and worked with the parties to set a series of periodic review hearings to oversee intermediate steps necessary to effectuate the settlement agreement, including: (1) generating plans acceptable to the city and the homeowner's association (HOA); (2) obtaining city and HOA permits; and (3) obtaining neighbor approval for the workmen to enter their property. Sensing a payday, some of the neighbors refused consent, insisting the Thurms purchase the sliver of encroached property. The city's ensuing lot line adjustment and concomitant surveys and drawings added significant further delay.

By late July 2006, with neighbor consent and the necessary permits still unresolved, the matter had been reassigned to Judge Siegel, who entered an order affording the parties three more months to conclude the settlement agreement.

In late August, Calkins moved to enforce the settlement agreement. The Calkins defendants complained they "have been prepared to fulfill all of their obligations under the Settlement Agreement but . . . cannot do so without the City and the HOA granting proper approvals."[1] The trial court set the hearing on Calkins's enforcement motion for October 16, 2006. No one realized that would be the five-year anniversary of the case.

The court continued the hearing to October 30, 2006. In a tentative decision posted before the hearing, the trial court expressed its understanding "that Judge Watson previously ruled that the settlement agreement was not enforceable . . . ." The court noted that enforcing the settlement agreement "without a resolution of the neighbor issues" would "require a possible law or tort violation," which the court would not countenance.

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[1] Judge Watson had previously included city officials and HOA personnel in discussions about implementing the settlement agreement.

At the hearing, the parties unanimously supported an extension to early December for the Thurms' neighbors to sign quitclaim deeds or other documentation required by the city. The court set an OSC for December 4th. As the hearing concluded, Hellmich revisited Judge Watson's ruling back in October 2005 denying the Thurms' motion to enforce the settlement. Hellmich opined, "It was my understanding that the plaintiffs never asked to void the settlement agreement or argued that the settlement agreement was void in any manner and that Judge Watson did not hold such a hearing to determine that." When the trial court agreed the earlier ruling "ha[d] nothing to do with whether [the settlement agreement] [i]s void or not," Hellmich concurred that nothing in the record suggested "the settlement agreement was unenforceable . . . ." The exchange appeared academic given the parties' assent to the December continuance, and the trial court simply concluded, "Let's stick with the December 4th [date] and . . . see if we can get this thing wrapped [up]."

Two days later, on November 1st, defendants brought an ex parte motion to dismiss the case for failure to bring it to trial within five years. (§§ 583.310; 583.360.) The trial court denied the motion, and we summarily denied defendants' ensuing writ petition. Calkins had not withdrawn its August motion to enforce the settlement agreement and, at the December 4th review hearing, the trial court granted that motion, concluding the settlement agreement was binding and enforceable.

At a subsequent hearing on the status of the requisite neighbor signatures and city and HOA approvals, defendants renewed their motion to dismiss under the five-year rule. The trial court again denied the motion. Satisfied that no obstacle remained to either party's performance under the settlement agreement, the trial court dismissed plaintiff's negligence suit. In its dismissal order, the trial court specified that, "having

previously ruled that the settlement agreement is enforceable, and the [p]laintiffs having shown to the satisfaction of the Court that any impediments to the settlement agreement have been resolved, the matter is now ordered DISMISSED." The court noted it would "retain jurisdiction pursuant to . . . section 664.6 to enforce the settlement agreement," if necessary.

II

DISCUSSION

Defendants challenge the trial court's determination that the settlement agreement was binding and enforceable despite the lapse of five years since the Thurms filed suit. Section 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant." Section 583.360 requires mandatory dismissal if the five-year period is exceeded, unless an exception applies.

In *Gorman v. Holte* (1985) 164 Cal.App.3d 984, 988, the court explained that the five-year period "applies exclusively to disputes which can and will be resolved only by trial." For matters in which a settlement agreement is reached, "a specific exception enunciated in section 583.340, subdivision (c) applies; during the time between the agreement to settle and the final execution of the settlement agreement by all the interested parties, it would have been 'futile' to bring the action to trial because all the issues had been resolved through settlement." (*Schiro v. Curci* (1990) 220 Cal.App.3d 840, 844-845; see § 583.340, subd. (c) [tolling five-year limitation during intervals in which "[b]ringing the action to trial . . . was impossible, impractical, or futile"].) Thus, it is well-established and uniformly recognized that "the time during which a settlement agreement is in effect tolls the five-year period, for the reason that attempting to bring an

action to trial when all issues have been resolved through settlement would be futile." (*Canal Street, Ltd. v. Sorich* (2000) 77 Cal.App.4th 602, 608-609, citing cases.)

Defendants contend the settlement agreement was never in effect because it amounted to an illegal contract. Specifically, it required defendants to trespass on the neighbors' property to complete the repairs. We are not persuaded.

Like other written contracts, we interpret written settlement agreements de novo. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) Contracts to commit illegal acts are void, not merely voidable. (Civ. Code, § 1441; *Black Hills Investments, Inc. v. Albertson's, Inc.* (2007) 146 Cal.App.4th 883, 896.) Defendants argue the settlement agreement "plainly required [them] to commit the crime of trespass." (See Pen. Code, § 602, subd. (d).) Indeed, defendants insist "[i]n this instant matter, ***on the face of the agreement,*** there was no way that the Settlement Agreement could be accomplished legally." (Original italics and bold.) This assertion flies in the face of reason. The neighbors' consent or, as happened here, the Thurms' purchase of the property, would avoid a trespass. The purpose of the agreement was to accomplish the needed repairs so the Thurms would drop their negligence lawsuit. "[A]n agreement that does not provide for a method of accomplishing its purpose and that can be accomplished in a legal manner will be construed to adopt the legal manner . . . ." (2 Cal. Affirmative Defenses (2008 2d. ed.) Construction Favoring Legality, § 37.3; accord, Civ. Code, § 3541 ["An interpretation which gives effect is preferred to one which makes void"].) Consequently, we find defendants' trespass argument lacks merit.

III

DISPOSITON

The judgment is affirmed. Respondents are entitled to their costs.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.